

## **REPORT OF THE SPECIAL COMMITTEE ON LIMITED SCOPE REPRESENTATION**

### **I. INTRODUCTION.**

The Supreme Court of Missouri and the Missouri Bar established the “Joint Commission to Review Pro Se Litigation” [“Pro Se Commission”] in October, 2002. The Commission was asked to assess (1) the extent of pro se litigation in Missouri family courts; (2) the current difficulties encountered by pro se representation, both by the litigants and the courts; (3) the measures that other states have adopted in response to the trend in self-representation.<sup>1</sup>

The Pro Se Commission issued its interim report to the Supreme Court of Missouri and to The Missouri Bar in September, 2004. The Commission concluded that “pro se litigants raise significant challenges for the courts and court staff.” In spite of the challenges, the Commission also concluded that the court system, “must respect the self-represented litigants’ right of access, and Commission recommendations must provide for a meaningful response to the barriers that self-represented litigants face. The most glaring barrier for most pro se litigants is the inability to find affordable legal services.” [emphasis added]

Recommendation number 6 of the interim report deals specifically with the issue of affordable legal services. In addition to recommending the expansion and use of lawyer referral services, the report states:

“Action should be taken to assist lawyers in being able to overcome potential malpractice and/or ethical obstacles when offering unbundled services. The unbundled services option is often cited as a way to provide more affordable representation for low-income Missourians. Additional action would be needed by the courts and bar associations at the policy level regarding risks of endorsement in developing unbundled options.”

President Douglas Copeland appointed members to “The Special Committee on Limited Scope Representation” in February, 2006 to examine and report on the feasibility and practice of limited scope representation legal services in Missouri. Members of the committee received significant input from Lori Levine, chairperson of the Pro-Se Commission, Sara Rittman, ethics

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<sup>1</sup> Pro Se Litigation Interim Feasibility Committee Report, September, 2004.

counsel for the Supreme Court of Missouri, Christian Stiegemeier, Vice President and Director of Risk Management, The Bar Plan Mutual Insurance Company and others. The Committee received and reviewed “An Analysis of Rules That Enable Lawyers To Serve Pro Se Litigants”, a white paper by the ABA Standing Committee on the Delivery of Legal Services, April, 2005 which provides “information and analysis on the ways in which various states are formulating or amending rules of professional conduct, rules of procedure and other rules and laws to enable lawyers to provide limited scope representation to clients who would otherwise proceed on a pro se basis, and to regulate that representation.” The Committee issues this report to analyze the legal and ethical considerations surrounding engagements to provide “limited scope representation”.

## **II. LIMITED SCOPE REPRESENTATION**

### **The concept of limited scope representation**

Limited scope representation, also known as “discrete task representation” and “unbundling of legal services,” is being considered across the country and implemented in a variety of ways. The packaging of legal services in tiers of service allows lawyers to provide services to persons unable to afford the customary full service packaging and pricing structure. Forest Mosten, author of *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte*, ABA Law Practice Management Section (2000), proposes several categories of services: counselor and advisor; ghostwriter for letters and court documents; negotiation and dispute resolution consultant; coach preparing client for court appearances, and preventive legal-wellness advisor. Another method of determining levels of representation is based on the difficulty of the matter and legal sophistication required. The Access to Justice project, for example, defines three categories for legal assistance to pro se domestic relations litigants: 1) largely mechanical legal services, such as an uncontested divorce with no children or property; uncontested custody cases; and custody cases with absent non-custodial parent; 2) cases calling for limited legal judgment and discretion, such as uncontested divorce with child support issue, modification of custody and access due to change in circumstances; and 3) cases requiring substantial legal judgment and discretion, such as child abduction; division of pension and business evaluation; and custody disputes involving allegations of child abuse or neglect. *Limited Service Representation and Access to Justice: An Experiment*, 11 AM.J. FAM.L. 1 (1997)

### **Limited Scope Representation as Addressed in Various States**

Approximately twenty states have expressly authorized limited scope representation with specific rules and procedures. The American Bar Association's Section on Litigation established a Modest Means Task Force. In 2003 it published a comprehensive Handbook on Limited Scope Representation that reviewed the pros and cons and recommended guidelines for ethical limited advocacy.

Informed Consent: Concerns have been expressed about a lawyer's duty to assess the client's ability to utilize limited legal assistance effectively. See *Having One Oar or Without a Boat*, 67 FORDHAM L.REV. 5 (Apr 1999). In *Lerner v. Laufer*, 819 A2d 471 (N.J. Chancery App. Div. 2003) informed consent was established as the benchmark for client consent. A client who became disenchanted with the property division in her divorce sued the lawyer she employed to provide limited scope representation asserting that regardless of their agreement the lawyer had a larger advocacy obligation than that contracted between them. New Jersey has a professional conduct rule expressly permitting lawyers, with consent of the client after consultation, to limit the scope of representation. The court upheld the limited scope representation agreement, stating that "the law has never foreclosed the right of competent informed citizens to resolve their own disputes in whatever way may suit them."

There is general consensus that a client should be informed about what discrete legal tasks are included in the representation. The American Bar Association's Handbook on Limited Scope Representation, includes a primer for drafting a limited representation agreement. Three dimensions of engagement are included: 1) identifying the legal problem for which lawyer will provide services; 2) describing the remedial measures the lawyer will take; and 3) identifying the services the lawyer will provide in the process. The ABA Handbook also advises that the lawyer alert the client to other foreseeable collateral problems that may arise and advise the client of possible need to obtain additional legal advice.

Written Engagement Agreement: The ABA Task Force recommends that a lawyer engaging in limited scope representation have a written engagement agreement with the client. Washington requires that the client consent in writing to limit the scope of representation when court proceedings will be involved. WASH. RPC 1.2(c). Some question the necessity of written engagement agreements in all instances. Maine only requires client consent in writing when the lawyer is being retained to enter a limited appearance in a court proceeding. Non-profit and

court annexed legal service programs are given as an examples where the time taken to enter an agreement may be disproportionate to the time consumed by the limited representation itself. ME. BAR RULE 3.4.(i) and comment. Florida recently removed the requirement for a written engagement agreement by revising its rule from “consent in writing” to “giving informed consent.” FLA. RPC 4-1.2(c)(March 2006). Wyoming requires consent in writing to limited scope representation unless the representation consists solely of telephone consultation. WY. RPC 1.2(c). Maine and Wyoming provide recommended forms for the written engagement agreement. Wyoming further provides that use of the notice and consent forms approved by the Board of Judicial Policy and Administration shall create the presumption that the representation is limited to the services described in the form and that the lawyer does not represent the client in any other matters. WY. RPC 1.2(c).

Signing Pleadings: Practical questions are raised with regards to ghost writing pleadings. In many states signing pleadings constitutes a general entry of appearance (i.e.- an appearance for all purposes). For example, Maine’s court rules allow limited appearances in court proceedings but once a lawyer signs a pleading filed with the court as a general appearance, the lawyer may not thereafter limit the scope of representation. ME. BAR RULE 3.4(i). In Colorado a lawyer must disclose drafting assistance provided, in most instances, by signing the pleading. Disclosure of drafting services does not, however, constitute an entry of appearance. Disclosure is not required for assistance provided in filling out pre-printed and electronically published forms approved by the court. COLO. R C P 11(b).

Lawyers are understandably disconcerted about signing pleadings vouching for content that may be edited or supplemented by the client. Washington lawyers are required to sign pleadings, motion and documents filed by an otherwise self-represented person but are entitled to rely on the clients’ representation of the facts unless the lawyer has reasons to believe that such representations are false or materially insufficient. WASH. SUPERIOR CR 11(b); similarly NEV. CR 11. Florida’s Family Law Rules of Procedure place responsibility on the pro se party who files a pleading or other document of record with the assistance of a lawyer to certify that assistance was received. FLA.FAM.LAW RULE 12.040(d). In California a lawyer in a family law proceeding is not required to disclose involvement in preparing court documents as long as the lawyer doesn’t make an appearance in the case. CALIF. RC 5.70(a). If a pro se litigant seeks attorneys fees incurred as a result of document preparation, the litigant must disclose the name of

the lawyer who provided assistance CALIF. RC 5.70(b). Iowa requires disclosure of the attorney's name, address and bar number for pleadings prepared for otherwise pro se litigants.

Federal Courts generally prohibit ghost writing as an unethical practice and as a material misrepresentation in violation of Rule 11 F.R.Civ.Pro. [In Re Richards J. Mungo, 305 B.R. 762 (Bkr. S.C. 2003); Wesley v. Don Stein Buick, 987 F.Supp. 884, 885 (D.Kan. 1997); Barnett v. LeMaster, 12 Fed. Appx. 774 (10<sup>th</sup> Cir. 2001); Duran v. Caris, 238 F.3d 1268 (10<sup>th</sup> Cir. 2001); Delso v. Trustees for Plan of Merck & Co., Inc., 2007 U.S. Dist. LEXIS 16643(D.N.J. March 5, 2007).

Entry of Appearance: Maine allows limited appearances as long as the lawyer does not file a pleading as a general appearance. ME. BAR RULE 3.4(i). Colorado provides that signing a pleading for an otherwise pro se party does not constitute a general entry of appearance. An appearance at any proceedings before a judicial officer, however, without giving notice of limitations does constitute a general appearance by a lawyer who represents an otherwise pro se party. A lawyer's violation of the limited appearance rule may subject the lawyer to sanctions. COLO RCP 11(b); similarly NEV CR 4.2(b). Florida and Washington permit lawyers to enter a limited appearance for particular proceedings. Florida also allows a lawyer in a family law case to change a general appearance to a limited appearance with leave of court. FLA. FAM. LAW RC. 12.040.

Communicating with Pro Se Party: In most states a lawyer is prohibited from communicating directly with another party represented by a lawyer. When a party has limited the scope of representation by his lawyer, the appropriate way to handle communications can be confusing. Colorado presumes that a pro se party to whom limited representation has been provided is unrepresented for the purpose of communication unless the lawyer seeking to communicate with the pro se party has knowledge to the contrary. COLO. RPC 4.2. The lawyer is not permitted to give any advice to a pro se party other than to obtain legal counsel. COLO. RPC 4.3. Both Maine and Washington provide that a party receiving limited representation is generally considered unrepresented for the purposes of communication. Communication shall take place through the lawyer acting in the scope of limited representation only when other counsel is provided with a written notice of a time period within which communications shall be made only with the pro se party's lawyer. ME. BAR RULE 3.6(f); WASH. REV. RPC 4.2(b). Florida follows the Colorado presumption unless a written notice of appearance is filed giving a

time frame for communications with the limited representation lawyer. FLA. FAM.LAW R. 4-4.2(b) and 4-4.3(b). Nevada combines the features of all the foregoing states. NEV. RPC 4.2(b) and 4.3(b).

Service upon Lawyer: Service is not authorized upon a lawyer who only signs pleadings for an otherwise unrepresented party under Colorado's Rules of Civil Procedure. COLO. RCP 11(b). Washington provides that service on the lawyer for an otherwise pro se party is only valid in connection with the specific proceedings for which the lawyer appears. WASH. RCP 70.1(b)

Termination of Appearance: In California, a streamlined procedure has been implemented in family law cases to terminate an appearance by filing a standardized form. CALIF. RC 5.71(b); CALIF. Form FL-955. The withdrawal is subject to a hearing if the client objects to the lawyer's withdrawal. CALIF. RC 5.71(e). Florida allows a lawyer who has made a limited appearance in a family law case to withdraw without leave of court upon filing a "termination of limited appearance." FLA. FAM.LAW RC 12.040(c). Washington has one of the most liberal withdrawal rules. A lawyer who is making a limited appearance in any civil case must file a "notice of limited appearance" prior to or simultaneous with the proceeding. The lawyer's role terminates at the conclusion of the proceedings identified in a notice of limited appearance without leave of court when the lawyer files a "notice of completion of limited appearance." WASH CR 70.1(b); similarly NEV CR 70.01(b). Wyoming does not even require the filing of a notice. A lawyer is deemed to have withdrawn when the lawyer has fulfilled the duties of the limited entry of appearance. WY. UNIFORM RULES 102(c).

### **The nationwide response to limited scope representation**

Alaska	authorized in 2004, RPC 1.2
Arizona	Supreme Court rule 42, RPC 1.2c
California	available in all civil cases as of Jan. 2, 2007
Connecticut	concept under study
Colorado	authorized in 1999 in all civil cases RCP 4.3 and RCP 11(b)
D.C. Bar	Opinion 330 (July 2005) limited scope representation is permissible
Florida	authorized in domestic relations cases, Fam. Law R. Proc. (2004) and in civil cases, RPC 401.2 and 4.b (May 2006)
Illinois	under study
Iowa	authorized RCP 1.404, 1.442, 1.423 (Mar. 2007)
Maine	authorized ME Bar Rules 3.4 and 3.6 (2001)
Massachusetts	pilot program in probate and family court (Fall 2006)
Minnesota	Pro Se Implementation Committee encourages in all civil cases

	(Feb. 2007 MSBA Bench & Bar)
Nevada	authorized by RPC 4.2(b) and 4.3(b), RCP 11(b),
New Hampshire	authorized by RPC 1.2 effective July 1, 2006
New Mexico	authorized in 2001, Rules 16-102, 16-303 (2001)
New York	NYS Bar Assn completed a report in Dec. 2002, no further action
Ohio	RPC adopted Feb. 2007 to “unambiguously authorize licensed attorneys to provide a limited scope of services to a client”
Vermont	authorized in landlord-tenant disputes
Washington	authorized, RPC 4.2(b), CPR 11(b)
Wisconsin	State Bar report 2004 recommends “encouraging unbundling”
Wyoming	authorized in 2002, Unif. Rule 102c

### **Experience of other states with limited scope representation**

The ABA Model Rules of Professional Conduct 1.2 (2000) acknowledges that it may be appropriate to limit the scope of representation. Most states have now adopted the revised model rules. The ABA Modest Means Task Force found that virtually everyone agrees that revisions in ethical rules reduce uncertainties and provide ethical “safe harbors” for lawyers who have concerns. Handbook on Limited Scope Legal Assistance (ABA 2003). Almost half of the states have now gone further and adopted additional provisions to clarify the scope of limited representation. No state which has adopted additional provisions has retracted them; in fact, several states have expanded them further. Both California and Florida started out facilitating limited scope representation in domestic relations matters and have subsequently expanded it to all civil cases. Several fears about limited scope representation have not developed:

- there has not been a groundswell of malpractice claims (Sue Talia, Webinar, 5/17/06, at [www.selfhelpsupport.org](http://www.selfhelpsupport.org). Florida received no disciplinary complaints up to the time of its post-implementation survey),
- no widespread procedural abuse (FL BAR Report of the Unbundled Legal Services Monitoring Committee. March 2005),
- no proclivity for the public to decrease the amount of representation they obtain ABA Report of the Modest Means Task Force, 11, (2003).

The American Judicature Society has worked with state courts for the past eight years in their efforts to promulgate rules allowing attorneys to provide limited legal assistance. Kate, Sampson a senior program associate, reports that

“In the states where it’s been done for a while, attorneys are comfortable with it. Once they see it’s working and that it can become a source of

revenue, they are supportive of it.”

(Des Moines Business Record, March 25, 2007). Lawyers typically charge their standard hourly rate and clients generally pay up front or as they contract for additional representation, avoiding the accounts receivable problems inherent in under-estimating the work involved in a case while calculating a retainer.

“These are not full service clients electing to cut corners; rather they are an untapped market of potential clients who are currently outside the scope of represented litigants... They need help, have issues worthy of an attorney’s attention, and can afford to pay for necessary legal assistance. They are grateful for the assistance they receive ... There is another factor also at work: they frequently evolve into full service representation. A client who believed the legal system to be as portrayed on television may be dismayed to find, after attending a hearing pro se, that there is a reason attorneys go to law school and they really do know something the client doesn’t. These people return with a new appreciation for the services that attorneys render.”

Ayn Crawley & Sue Talia, Maryland Legal Assistance Network SHO Conference (2002). Woodie Mosten, a lawyer who provides “discrete task coaching” in California reports that “Many of our biggest litigation cases are conversions from coaching. These clients selected our firm due to our unbundling approach but for various reasons decided to convert to full-service representation. Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte, Forrest S. Mosten, ABA (2000).

Elizabeth Scheffee, a family law practitioner with Givertz, Hambley, Scheffe & Lovoie, in Portland, Maine reports that offering limited scope representation has allowed her to provide more legal representation to people of modest means. Typical services involve providing consultations, assistance in filling out court authorized forms, drafting judgments and property distribution documents. (Presentation at Midwest Regional Conference on Pro Se Litigation, sponsored by the American Judicature Society, September 2006; telephone interview, March 19, 2007). Full representation may involve commitment of the lawyer’s time for travel and waiting in court, which are not particularly meaningful legal tasks charged to the client. By agreeing with the client of modest means to limit the scope of representation, a lawyer has more control over the expenditure of time so that efforts may be devoted to meaningful tasks of benefit to the



client. Unbundling Legal Services in Mediation, Reflections of a Family Lawyer, 40 FAM.COURT.REV. 76, 77 (2002).

Many attorneys report satisfaction with a practice that encompasses limited scope representation. Ms. Scheffee reported that twenty percent of her practice involved limited scope representation. Law Firms Find New Revenue in Unbundling, National Law Journal, July 6, 2005, and that she found providing assistance to people of modest means very rewarding and less stressful (Telephone interview, 03/19/07). Suzanne Lieberman practices in a Seattle law firm that provides both full and limited legal services. She describes limited services as “among the most rewarding that I provide.” Clients (who) cannot afford the pay the standard \$5,000 retainer in domestic cases have sufficient resources for the limited representation they need. Handbook on -46 Limited Scope Assistance, 45 (ABA 2003). A survey of Florida lawyers two years after the adoption of rules in domestic relations cases revealed that seventy percent of lawyers had positive experiences with limited scope representation and another twenty percent reported their experience as mixed. FL BAR Report of the Unbundled Legal Services Monitoring Committee. March 2005. A survey of Australia solicitors found that seventy-five percent of the respondents had provided discrete task representation and ninety percent were willing to do so in the future. Survey by Craig Cameron, Griffith University School of Law, appearing in Legal Consumers as Co-producers: the Changing Face of Legal Service Delivery in Australia, 40 FAM.CT.REV. 63, 65 (2002).

Legal service resources for the poor are dwindling. Appeals for pro bono service has had limited success to some extent because of the unpredictability of the time commitment. (A survey conducted by The Missouri Bar in 2003 confirms that hourly billing concerns have a negative impact on participation in pro bono activities. MO. Lawyers Weekly, October 20, 2003). People of modest means increasingly have no choice but to resort to their own best efforts to look after themselves unless a mechanism is found for access to legal assistance. Other states that have endorsed limited scope representation take the approach that some legal assistance is better than none. Limited scope representation increases the feasibility for busy practitioners to volunteer time to assist otherwise pro se litigants in meaningful ways. The time and resources of legal services attorneys may be more appropriately channeled when they can limit the scope of representation to meaningful tasks. Superior Court Commissioner Kimberly Prochnau, King County, Washington, has witnessed this effect:

“Unbundling has increased the pool of volunteer attorneys. It has also made it more likely for people to be able to get an attorney at a critical stage of the proceedings.”

Law Firms Find New Revenue in Unbundling, National Law Journal, July 6, 2005.

A Limited Representation Referral Service Panel created by the Contra Costa County Bar Association, to help those in the community who would not otherwise have the assistance of a legal professional, won an ABA award for legal services in 2004. The attorney and client mutually agree to handle a specific and limited set of services, tailored to the needs and concerns of the client through a detailed contract. Mark Gardner, a Minnesota lawyer estimates that most of his limited assistance clients make less than \$25,000 per year. He drafts documents and provides representation in discrete hearings (eg. expedited child support hearing and domestic violence hearings), customarily charging a flat fee of \$350-\$450 for these services. Handbook on Limited Scope Representation, 47 (ABA 2003). In Australia, limited legal services offered through public sector legal aid has permitted them to spread their services more widely and reduce the cost of service delivery. Legal Consumers as Co-producers: the Changing Face of Legal Service Delivery in Australia, 40 FAM.CT.REV. 63, 70-71 (2002)

### **III. ETHICAL ISSUES RELATED TO LIMITED SCOPE REPRESENTATION.**

Although the Missouri Rules of Professional Conduct do not currently prohibit attorneys from performing limited scope representation, some rules are unclear, in this context. Rule 4-1.2 allows an attorney to limit the objectives<sup>2</sup> of the representation, with client consent. However, additional language in the rule and comments could make this option clearer.

In limited scope representation situations, the application of Rules 4-4.2 and 4-4.3 can be ambiguous. Is the person who is receiving limited representation from a lawyer represented for purposes of the rule prohibiting lawyers from contacting a represented person? Alternatively, is the person receiving limited representation an unrepresented person to whom Rule 4-4.3 applies? Clarification of the application and interplay of these rules in limited scope representation situations will enable lawyers to engage in ethical communications with other parties and will avoid delaying matters due to lawyers' uncertainty about whom they can contact.

The other primary ethical issue relates to whether the court is misled when a lawyer participates in litigation in the background but the lawyer's participation is not disclosed to the

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<sup>2</sup> The word “objectives” is changed to “scope” in the version of Rule 4-1.2 that will become effective on \_\_\_\_.

court. Rules 4-3.3 and 4-8.4(d) could come into play in these situations. Different courts have taken different positions on this issue. As a result, this issue should be addressed in the Rules of Professional Conduct, the Rules of Civil Procedure, or both. Lawyers proceed with uncertainty if the rules do not clearly establish whether a lawyer must identify his or her involvement in a matter, particularly if the lawyer has assisted a client with preparing pleadings or other documents. If a lawyer must identify his or her involvement, the rules must address whether that disclosure constitutes an entry of appearance by the lawyer. If the rules require disclosure but do not provide for a limited entry of appearance or that this disclosure does not necessarily constitute an entry of appearance, many lawyers will be unwilling to provide limited scope representation legal services resulting in severe limitations on the ability of clients to obtain limited scope legal services.

Some have expressed concern that attorneys will use this limited appearance approach to delay litigation and create burdens for the opposing party and counsel. Use of limited appearances in a bad faith manner can be addressed by the court in which the case is pending or the existing disciplinary rules, or both, in the same manner as other bad faith conduct.

The Pro Se Commission, working with the assistance of this committee, has proposed new rules to address some of the ethical and procedural concerns unique to limited scope representation. These rules are located in Appendix A.

#### **IV. PROFESSIONAL LIABILITY ISSUES**

Perhaps the biggest risk a lawyer faces in a limited representation is simply to understand that such an engagement does not necessarily come with limited legal malpractice risks. Careful client and case screening and a conscientious determination that a limited representation is best for the client's interests, not the lawyers, are required.

Lawyers in limited scope representations should employ explicitly and plainly worded Limited Representation Agreements outlining the lawyer's role. The agreement should address how the arrangement benefits the client (lower costs, generally) and at whose request the representation is being limited (the client, generally). Additionally, such an agreement should concisely identify the legal problem for which lawyer will provide services and plainly and completely describe the services the lawyer will, and will not, provide. Further, the agreement should place into the context of the representation the source (generally, the client) of the information the lawyer relies on to provide the stated services, alert the client to other

foreseeable collateral problems that may arise and advise the client of the possible need to obtain additional legal advice.

Because a limited scope representation limits the lawyer's ability to cure problems that may arise as the matter goes forward, lawyers engaging in limited scope representation should understand that more time and effort may well have to go into the initial evaluation of the client and case in a limited scope setting than in the traditional full-representation.

A comprehensive approach to the issues that must be addressed by the lawyer with the client in deciding whether limited scope legal services are an appropriate option can be found in the American Law Institute's RESTATEMENT OF THE LAW THIRD, The Law Governing Lawyers, §19, Agreements Limiting Client or Lawyer Duties, Comment (c)-Limiting a representation:

First, a client must be informed of any significant problems a limitation might entail, and the client must consent.

Second, any contract limiting the representation is construed from the standpoint of a reasonable client.

Third, the fee charged by the lawyer must remain reasonable in view of the limited representation.

Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests for postinception contracts or modifications.

Fifth, the terms of the limitation must in all events be reasonable in the circumstances. When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver-typically, a reduced fee or the ability to retain a particularly able lawyer-could reasonably be considered to outweigh the potential risk posed by the limitation. It is also relevant whether there were special circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not all lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

An often overlooked malpractice concern in limited scope representation is the lawyer's duty to take reasonable steps to protect the client's interests, even in a limited representation, for which the lawyer has not taken responsibility. See, for example, *Keef v. Widuch*, 747 N.E.2d 992 (Ill. App. 2001). "Although a representation agreement may limit the scope of representation to a particular legal course of action, the client must be made to understand that the course of action is not the sole potential remedy and that there exist other courses of action that are not being pursued." *Id.* at 577. In *Nichols v. Keller*, 15 Cal.App. 4<sup>th</sup> 1672, 19 Cal.Rprt. 2<sup>nd</sup> 601 (1993), the court stated that even when a retention is expressly limited, "...the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel." *Nichols*, 15 Cal.App. 4<sup>th</sup> at 1683-84, 19 Cal.Rprt. 2<sup>nd</sup> at 608.

Cases such as these throw doubt on a Limited Representation Agreement's effectiveness in protecting against allegations of failing to inform the client of specific and reasonably identifiable risks beyond the limited scope representation. Also, informing a client generally that there are risks to a limited representation will ordinarily not protect the lawyer from allegations of damages arising from a specific harm.

An issue of competent representation can arise if a lawyer in a limited scope representation does not consider and reasonably conclude that the client can proceed pro se with the remainder of the tasks involved in resolving the legal problem. For example, does the client have the capacity to make rational decisions in the matter? Such an inquiry may be extremely fact and situation dependent.

Additionally, the lawyer should carefully consider and reasonably determine that the client has sufficient understanding of the legal issues and their relationship to the client's goals, is in fact capable of proceeding pro se and thus able to derive the benefit of the lawyer's limited services in the matter. This might include evaluating the client's understanding of the client's role in the process beyond the attorney's involvement, of the many tasks the client will need to engage on the client's own, and of the relevant substantive law and procedures. Although this

may be an involved inquiry, the failure to engage in this process could arguably mislead the client regarding the likelihood of success

The malpractice risks of limited scope representations are regularly downplayed by proponents because the inquiry generally focuses on the dearth of reported claims resulting from such representations. This focus is misleading on the issue for several reasons.

First, the advent of limited scope representation is relatively recent in relation to studying the issue for malpractice risks. The various state Supreme Court rules regulating the practice have only been in place for a few years. However, because of the “claims-made” nature of legal professional liability insurance, it can take many years of claims reporting to develop a history sufficient to determine statistically the level of malpractice risk of this type of representation.

Second, claims reporting statistic methods do not presently lend themselves to identifying claims arising from limited scope representation, in that there is no such category. Currently, for example, if a lawyer is in a limited scope representation and fails to meet a deadline, the claim would be categorized as “Fail to Ascertain Deadline Correctly” even if the failure was a result of the limited nature of the representation.

Anecdotally, The Bar Plan Mutual Insurance Company has, in the last several years, had to resolve claims arising in limited scope representations, generally resulting from the failure of the attorney and the client to agree on the scope of the attorney’s role. That is, the attorney understood what the extent of the attorney’s representation was, and the client understood what the extent of the attorney’s representation was, it was just that the two of them did not have the same understanding.

For most lawyers, it is counterintuitive to think that providing limited representation by unbundling their legal services may create more malpractice risks than a traditional full representation. That may well be the case, however.

## **V. CONCLUSION**

The Special Committee on Limited Scope Representation supports the efforts of the Pro Se Commission to identify and promote resources to assist litigants in locating affordable legal services. The members of the Committee, to a person, believe that an individual is best served by counsel retained for all aspects of a given legal proceeding. On the other hand, the

Committee is mindful of the fact that every individual has the right to self-representation and some choose not to utilize counsel. The Committee endorses the utilization of limited scope representation where both the client and counsel believe that the interests of justice can be served thereby. The Committee supports the efforts of the Pro Se Commission to amend the Rules of Professional Conduct and Civil Procedure to ensure that the delivery of limited scope representation serves the best interests of the client, both ethically and procedurally.

The Committee is mindful that some members of the Bar view limited scope representation as a radical departure from the current methods of practice. However, limited scope representation has been practiced ethically within this State and others. The Committee believes it is time to acknowledge this practice and provide additional guidance and regulation that protects both the litigant and the lawyer delivering the limited scope of representation.

## **VI. ACKNOWLEDGEMENTS**

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Alan B. Gallas, Chairperson





## Appendix A

### **Proposal for revisions to Missouri Rules of Professional Conduct to clarify authorization of limited scope representation**

This draft proposes to clarify rules of professional conduct allowing a lawyer to limit the scope of representation to assist an otherwise pro se client with discrete tasks that do not involve an appearance in court. The authorization of limited appearance in a court proceeding is not addressed by this proposal.

#### Proposed Revision of MO.RPC Rule 4-1.2(c) ... **limited representation**

A lawyer may limit the scope of representation if the client gives informed consent in writing. Use of the written Notice and Consent form, or a form substantially similar to the approved form, shall create the presumptions that (a) the representation is limited to the lawyer and the services described in the form and (b) the lawyer does not represent the client generally or in any matters other than those identified in the form.

An otherwise unrepresented party to whom limited representation is being provided or has been provided is considered to be unrepresented for purposes of communication under rule 4-4.2 and 4-4.3 except to the extent the lawyer acting in the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-represented.

Providing limited representation of a person under these rules shall not constitute an entry of appearance as attorney of record, so that the client is otherwise self-represented, and does not authorize or require the service or delivery of papers upon the lawyer providing limited representation.

#### **COMMENT:**

The rules authorize a lawyer to assist a pro se litigant on a limited basis without undertaking the full representation of the client on all issues related to the legal matter for which the lawyer is engaged. The Court is seeking to enlarge access to justice in Missouri Courts. Any doubt about the scope of representation should be resolved in a manner that promotes the interests of justice and those of the client and opposing party. Use of a written agreement for limited representation is required.

The lawyer shall explain to the client the risks and benefits of limited representation during consultation on limiting the scope of representation. An agreement for limited representation does not exempt a lawyer from the duty to provide competent representation; however, the limitation of the scope of representation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation as required in rule 4-1.1.

## Sample Form for Limited Representation Agreement - Draft D5

### Notice and Consent to Limited Representation

To help you with your legal matters, you, the client, and \_\_\_\_\_, the lawyer, agree that the lawyer will limit the representation to helping you with a certain legal matter for a short time or for a particular purpose.

The lawyer must act in your best interest and give you competent help. When a lawyer and you agree that the lawyer will provide limited help:

- The lawyer DOES NOT HAVE TO GIVE MORE HELP than the lawyer and you agreed; and
- The lawyer DOES NOT HAVE TO HELP WITH ANY OTHER PART of your legal matter.

While performing the limited legal services, the lawyer:

- Is not promising any particular outcome; and
- Is relying entirely on your disclosure of facts and will not make any independent investigation unless expressly agreed to in writing in this document.

If short-term limited representation is not reasonable, a lawyer may give advice, but will also tell you of the need to get more or other legal counsel.

I, the lawyer, agree to help you by performing the following limited services listed below and no other service, unless we revise this agreement in writing. [INSTRUCTIONS: Check every item either **Yes** or **No** do not leave any item blank. Delete all text which does not apply.]:

#### **Y N**

- a) ☐ ☐ Give legal advice through office visits, telephone calls, fax, mail or email.
- b) ☐ ☐ Advise about alternate means of resolving the matter including mediation and arbitration;
- c) ☐ ☐ Evaluate the client's self-diagnosis of the case and advise about legal rights and responsibilities;
- d) ☐ ☐ Review pleadings and other documents prepared by you, the client;
- e) ☐ ☐ Provide guidance and procedural information regarding filing and serving documents;
- f) ☐ ☐ Suggest documents to be prepared;
- g) ☐ ☐ Draft pleadings, motions and other documents;
- h) ☐ ☐ Perform factual investigation including contacting witnesses, public record searches, in-depth interview of you, the client;
- i) ☐ ☐ Perform legal research and analysis;
- j) ☐ ☐ Evaluate settlement options;

- k) ☐ ☐ Perform discovery by interrogatories, deposition and requests for admissions;
- l) ☐ ☐ Plan for negotiations;
- m) ☐ ☐ Plan for court appearances;
- n) ☐ ☐ Provide standby telephone assistance during negotiations or settlement conferences;
- o) ☐ ☐ Refer you, the client, to expert witnesses, special masters or other attorneys;
- p) ☐ ☐ Provide procedural assistance with and appeal;
- q) ☐ ☐ Provide substantive legal arguments in an appeal;
- r) ☐ ☐ Appear in court for the limited purpose of \_\_\_\_\_;
- s) ☐ ☐ Other: \_\_\_\_\_.

I will charge to the Client the following costs: \_\_\_\_\_

I will charge to the Client the following fee for my limited legal representation:  
\_\_\_\_\_.

\_\_\_\_\_ Date: \_\_\_\_\_  
[Type Lawyer's name]

### CLIENT'S CONSENT

I have read this Notice and Consent form and I understand it. I agree that the legal services listed above are the ONLY legal services to be provided by the lawyer. I understand and agree that the lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me more legal help. If the lawyer is giving me advice or is helping me with legal or other documents, I understand the lawyer will stop helping me when the services listed above have been completed.

The address I give below is my permanent address where I may be reached. I understand that it is important that the court handling my case and other parties to the case be able to reach me at the address after the lawyer ends the limited representation. I therefore agree that I will inform the Court and other parties of any change in my permanent address.

In exchange for the Lawyers limited representation, I agree to pay the attorney's fee and costs described above.

Sign your name: \_\_\_\_\_

Print your name: \_\_\_\_\_

Print your address: \_\_\_\_\_

\_\_\_\_\_  
Phone number: \_\_\_\_\_ FAX: \_\_\_\_\_

Message Phone: \_\_\_\_\_ Name: \_\_\_\_\_

Email address: \_\_\_\_\_

Proposal for Revision to MO.Supreme Court Rule 55.03

**55.03 Signing of Pleadings, Motions and Other papers; Appearance and Withdrawal of Counsel; Representations to Court; Sanctions**

**(a) Signature Required.** Every pleading, motion and other filing shall be signed by a least one attorney of record in the attorney's individual name or, if the party is not represented by an attorney shall be signed by the party. A lawyer who assists an otherwise self-represented person to draft a pleading, motion or document, or the party who files the pleading, motion or document, is required to indicate that the lawyer provided assistance in drafting the pleading, motion or document. The pleading, motion or document prepared for an otherwise self-represented person shall include a notation "Prepared with the Assistance of Counsel" and the name, bar number, or both, of the attorney who provided assistance on the document. Every filing made electronically must add a certificate verifying that the original was signed by the attorney or party shown as the filer. The original signed filing must be maintained by the filer or a period of not less than the maximum allowable time to complete the appellate process.

Each filing shall state the filer's address, Missouri bar number if applicable, telephone number, facsimile number and electronic mail address, if any.

An unsigned filing or an electronic filing without the required certification shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party filing same.

**(b) Appearance and Withdrawal of Counsel** An attorney who appears in a case shall be considered as representing the party or parties for whom the attorney appears for all purposes, except as otherwise limited by a written entry of appearance. Service of papers shall be made on the self-represented person and not on the lawyer providing limited representation. An attorney appears in a case by:

- (1) participating in any proceeding as counsel for any party, unless limited by Notice of Limited Appearance;
- (2) permitting the attorney's name to appear on any pleading or motion, except that an attorney who assisted in the preparation of a pleading and whose name appears on the

- pleading as having done so shall not be deemed to have entered an appearance in the matter; or;
- (3) a written appearance. A written entry of appearance may be limited, by its terms, to a particular proceeding or matter by filing a Notice of Limited Appearance. An attorney who has entered a limited entry of appearance shall be deemed to have withdrawn when the attorney has fulfilled the duties of the limited entry of appearance and files a Termination of Limited Appearance with the Court;
  - (4) A limited entry of appearance for an otherwise self-represented person does not authorize or require the service or delivery of papers upon the attorney providing limited representation.

**(c) Representation to the Court** By presenting and maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances, that:

- (1) the claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) The claims, defenses and other legal contentions therein are warranted by existing law or by the non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;
- (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. An attorney in providing such limited scope assistance may rely on the otherwise self-represented person's representation of facts unless the lawyer knows that such representations are false; and.
- (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(renumber remaining sections of rule 55.03)

**COMMENT:**

Clients often cannot afford to hire a lawyer to represent them fully throughout the course of litigation yet may be able to afford to hire a lawyer to represent them in performing discrete tasks. One of the discrete parts of litigation most amenable to limited task representation is the preparation of pleadings, motions or other documents related to the litigation. Such assistance can benefit the court and the parties to the litigation by more precisely defining the legal issues and more clearly stating the facts. A lawyer providing limited drafting assistance in litigation should be given guidance as to the lawyer's responsibilities of inquiry as to the grounds and purposes of the litigation. (MO RPC 4-3.1 and Rule 55.03(b)). In recognition of the lawyer's limited role, the lawyer should be allowed to rely on the client's representations unless the

lawyer knows that client's representation are false. Even in a case where a lawyer is obligated to make independent inquiry, the court and parties would benefit from the likelihood of more professionally drafted documents. (MO RPC 4-3.3 requires candor toward tribunal).